IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 896 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL
AND
HONOURABLE MR.JUSTICE H.B.ANTANI

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether Their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

==========

STATE OF GUJARAT - Appellant

Versus

BANSILAL MAGRULAL PASWAN & ANOTHER - Respondents

==========

Appearance :
MR KT DAVE, Additional Public Prosecutor for the Appellants.
MR MJ BUDHDHBHATTI for the Respondents.
==========

CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 30/11/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE H.B.ANTANI)

1. Instant appeal, filed by the State of Gujarat under Section 378 of the Code of Criminal Procedure, 1973 (“the Code”, for short), is directed against judgment dated

July 27, 1998 rendered by the learned Additional City Sessions Judge, Court No. 3, Ahmedabad in Sessions Case No. 174 of 1997, by which the respondents have been acquitted for the offences punishable under Section 20 (b) (i) read with Section 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 (“the Act”, for short) as well as under Section 66 (1) (b) of the Bombay Prohibition Act, 1949.

2. The short facts emerging from the record of the case are stated hereinbelow:

Mr. S. V. Tehlramani, Police Inspector, working in the State Narcotic Cell, CID, Crime Branch, Ahmedabad received information on June 7, 1997 that two persons residing in Santoshnagar slums situated in Kubernagar, near Sardarnagar Police Station area were in possession of *ganja*. On receipt of the information, he reduced the same into writing. He also made report of the same to his immediate higher official. Thereafter, he asked Head Constable Mr. K. A. Sathwara to requisition services of two *panch-witnesses*. Accordingly, two persons i.e. Hariram Murajmal Khemani and Prakash Vasudev Sindhi were summoned. They showed their willingness to work as

panch-witnesses. Therefore, the information received by PI Mr. Tehlramani was conveyed to them. PI Mr. Telhramani secured necessary material like seal, wax, twine, etc. for the purpose of carrying out the raid after which first part of *panchnama* was drawn. Thereafter, he proceeded in the Government vehicle along with the informant and others, including Mr. Modi, who was then ACP, to the place mentioned in the information received by him. On reaching Santoshnagar slums, they got down from the vehicle and the informant pointed out the house of the persons who were having possession of *ganja*. When PI Mr. Tehlramani went to the place shown by the informant, he found that two persons were sitting on a cot kept below the banyan tree outside the house. He interrogated them. They disclosed their names as: Bansilal Mangrulal Paswan i.e. respondent No. 1 and Dinanath Bansilal Paswan i.e. respondent No. 2. PI Mr.Tehlramani conveyed the information received by him to them and informed that it was necessary to search them. Before effecting the search of their persons, PI Mr.Tehlramani offered them to have the search in the presence of a Gazetted Officer. However, that offer was declined by the respondents. Thereupon, their persons were searched, but nothing incriminating was found from

their persons. Thereafter, the search of the house was carried out. It resulted into find of *ganja* kept in two different tins, one of which was bearing the inscription of the name of Dinanath. The substance found was ascertained to be *ganja* by smelling. PI Mr. Tehlramani demanded pass or permit from both the persons authorising to possess *ganja*, but they could not produce the same. Thereafter, *ganja* was weighed by Head Constable Gosai. Its weight was found to be 10.200 Kgs. From this quantity, two samples, each of 50 grams was drawn i.e. one to be sent to Forensic Science Laboratory ("FSL", for short) for analysis and another to be treated as reserve sample. Each sample was placed in a tin and wrapped with cloth. Slips bearing signatures of *panch-witnesses* were affixed on the clothes and sealed having inscription of "PI NDPS GS CID, Ahmedabad". During the search, ration-card was also found in which the names of respondents were mentioned. After completing the abovementioned formality, second part of *panchnama* was drawn. Thereafter, PI Mr. Tehlramani lodged his complaint and produced *muddamal, panchnama,* respondents, etc. before the Police Station Officer (PSO). The PSO registered the offences against the respondents and handed-over the investigation to Police Sub-Inspector Mr. M. M. Thakore.

On transfer of PSI Mr. Thakore, further investigation was made by PSI Mr. N.G. Bhatti. The statement of the persons, who were found to be conversant with the facts of the case, were recorded by the Investigating Officer. *Muddamal* sample was sent to FSL for analysis. The report of analysis indicated that *muddamal* analysed was *ganja* withing the meaning of the Act. On completion of investigation, chargesheet was filed against the respondents and they were produced before the learned Additional City Sessions Judge, Court No. 3, Ahmedabad. On the basis of chargesheet, Sessions Case No. 174 of 1997 was registered against the respondents.

3. The charge against the respondents was framed *vide* Exh. 2. The charge was read-over and explained to them. They pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined following witnesses to prove its case:

(i) PW1 Suraj Visandas Tehlramani, at Exh. 8.

(ii) PW2 Hariram Murajmal Khemani, at Exh. 19.

(iii) PW3 Navinpuri Narsinhpuri Gosai, at Exh. 24.

(iv) PW4 Atmaram Janardhan Marathe, at Exh. 26.

(v) PW5 Chauhan Mohatsinh Govindsinh, at Exh. 28.

(vi) PW6 Magansinh Mansinh Thakore, at Exh. 29.

(vii) PW7 Natvarsinh Javansinh Bhatti, at Exh. 36.

The prosecution also placed reliance on documentary evidence in support of its case. They are as under:

(i) Complaint given by Mr. Tehlramani, Police Inspector, Narcotic Cell, at Exh. 9.

(ii) Letter addressed by PI Mr. Tehlramani to PSO, Sardarnagar Police Station, at Exh. 10.

(iii) Information received by PI Mr. Tehlramani and forwarded to Police Superintendent, State Narcotic Cell, Ahmedabad, at Exh. 11.

(iv) Resolution passed under Section 42 of the Act, at Exh. 12.

(v) Report in respect of arrest of the accused, at Exh. 13.

(vi) Seizure memo of the contraband item, at Exh. 14.

(vii) Document indicating that the grounds of arrest were communicated to the accused, at Exh. 15.

(viii) Resolution indicating that the provisions of Section 50 were complied with, at Exh. 16.

(ix) Report forwarded to the Police Superintendent, State Narcotic Cell, CID, Crime Branch, Ahmedabad by PI Mr. Tehlramani, at Exh.

17

(x) Document indicating that information received was reduced into writing, as required under Section 42 (1), at Exh. 18.

(xi) *Panchnama* of the raid, at Exh. 20.

4. After recording of the evidence of the prosecution witnesses was over, the learned Judge explained to the respondents the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statements, as required under Section 313 of the Code. The respondent No. 1, in his statement, claimed that his thumb impression was taken on Exhs. 15 and 16. He also claimed that the ration-card was not belonging to him. He further stated that no offer, as contemplated by Section 50 of the Act, was made to him. According to him, a false case was foisted upon him. The respondent No. 2 stated that he was arrested when he was passing on the road. It was further claimed by him that he was arrested from the Railway Station as he is residing near Naroda Station and was not knowing anything about seizure of contraband substance. However, no defence evidence was adduced by any of the respondents.

5. On appreciation of evidence adduced by the prosecution, the learned Judge held that no report, as contemplated under sub-section (2) of Section 42, was forwarded by PI Mr. Tehlramani to his immediate official superior and, therefore, there was breach of mandatory provisions contained in sub-section (2) of Section 42 of the Act. According to the learned Judge, the provisions contained in Section 55 of the Act were not complied with, inasmuch as the PSO, while keeping the contraband article in safe custody, failed to apply his seal. The learned Judge also held that provisions of Section 57 of the Act were not complied with by PI Mr. Tehlramani inasmuch as the report containing details of arrest and seizure was not forwarded by PI Mr. Tehlramani to his immediate official superior. It was further held by the learned Judge that the provisions contained in Section 102 (3) of the Code were not complied with and, therefore, the case of the prosecution was doubtful. The learned Judge also held that the respondents were neither the owner nor in possession of the house from which contraband article was seized. The learned Judge further held that the accused were not in conscious possession of the contraband article and were entitled to reasonable benefit of doubt. According to the learned Judge,

investigation was incomplete and / or inadequate and, therefore, the prosecution case was liable to be disbelieved. The learned Judge noticed that *muddamal* was not kept in safe custody which did not rule out the possibility of tampering with the same. The learned Judge further held that no independent witnesses were examined by the prosecution to bring home the guilt against the respondents and, therefore, they were entitled to be acquitted. In view of abovereferredto conclusions, the respondents have been acquitted by judgment dated June 27, 1998, giving rise to the present appeal.

6. This appeal was placed before the Division Bench, comprising M.S.Parikh and A.K.Trivedi, JJ. on March 19, 1999. After hearing the learned Additional Public Prosecutor for the State, the following order was passed:

> "Heard the learned APP for the Appellant-State.
>
> Perused the impugned judgment of acquittal for the offence charged against the respondents under the relevant provisions of the N.D.P.S. Act. Bearing in mind the peculiar facts of the case, we pass the following order:
>
> Leave granted. Appeal admitted. Bailable Warrants in the sum of Rs. 5000/- each with following conditions to issue:
>
> 1. The respondents will furnish their complete

address to the trial Court.

2. They will remain present before this Court as and when required.

3. They will report change in their addresses, if any, to the trial Court as well as to the Court."

7. The record shows that though the respondents are duly served, they have not appeared either in person or through their lawyer. Having regard to the facts of the case, this Court was of the opinion that a Senior Advocate, practising in this Court, should be appointed to render legal assistance to the respondents. Accordingly, Mr. M. J. Budhdhbhatti was appointed to render legal assistance to the respondents and Mr.Bhudhdhbhatti has rendered valuable and competent legal assistance to the respondents.

8. Mr. K. T. Dave, learned Additional Public Prosecutor, representing the State submitted that the search and seizure was effected by PI Mr. Tehlramani, who was a Gazetted Officer and also an Empowered Officer withing the meaning of Section 41 (2) of the Act as a result of which, it was not necessary for him to forward any report to his immediate official superior within the meaning of Section 42 (2) of the Act and, therefore, the

learned Judge was not justified in coming to the conclusion that there was breach of provisions of Section 42 (2) of the Act. According to the learned Additional Public Prosecutor, the provisions of Section 55 of the Act are not applicable to the facts of the case and the learned Judge was not justified in coming to the conclusion that there was violation of provisions of Section 55 of the Act. The learned Additional Public Prosecutor further submitted that there was full compliance of the provisions of Section 57 of the Act and the learned Judge was not justified in holding that there was non-compliance of Section 57 of the Act. After referring to the provisions of Section 52-A of the Act, it was submitted that it is not applicable to the facts of the case at all and it is not understandable as to on what basis the learned Judge has come to the conclusion that there was breach of provisions of Section 52-A of the Act. The learned Additional Public Prosecutor further submitted that there was no breach of Section 102 (3) of the Code inasmuch as the factum of seizure was reported when the respondents were produced before the Court and an application for their police custody was made. The learned Additional Public Prosecutor further submitted that the finding recorded by the learned Judge,

that the respondents were neither the owners nor in possession of the house where the raid was carried out, is contrary to the weight of evidence on record and liable to be set aside. The learned Counsel also asserted that both the respondents were found in possession of contraband article and therefore, the learned Judge was not justified in coming to the conclusion that they were not in conscious possession of the same. The learned Additional Public Prosecutor further submitted that taking into account the entire oral and documentary evidence, the finding given by the learned Judge, that the investigation was insufficient, inadequate or not proper, is not justified and no benefit should have been granted to the respondents on those counts. The learned Additional Public Prosecutor contended that *muddamal* was kept in safe custody and reached FSL intact, as a result of which, the learned Judge was not justified in holding that there was possibility of tampering with the same. The learned Additional Public Prosecutor further submitted that the learned Judge was not justified in holding that as no independent witnesses were examined, the prosecution case was liable to be doubted more particularly when case of the prosecution was proved by reliable evidence of police

officials. According to the learned Additional Public Prosecutor, the learned Judge has failed to appreciate the evidence on record in its true perspective and, therefore, the appeal should be allowed.

9. Mr. M. J. Budhdhbhatti, appearing for the respondents, submitted that the prosecution could not establish satisfactorily that the respondents were in possession of the house from which the contraband article was found and, therefore, acquittal should be confirmed. According to the learned Counsel, mandatory provisions of Section 42 (2), 50, 55, 57 of the Act as well as Section 102 (3) of the Code were not complied with by PI Mr. Tehlramani and, therefore, impugned judgment should be confirmed. The learned Advocate further submitted that the evidence shows that the panch was selected and, therefore, the learned Judge of the Trial Court, who had advantage of observing the demeanour of the witnesses, was justified in not placing reliance on his testimony while considering guilt or otherwise of the respondents. According to the learned Counsel, it could not be established by the prosecution that the respondents were in conscious possession of contraband article nor evidence could be led that respondent No. 2 had abetted

and/or aided respondent No. 1 in the commission of offence punishable under Section 20 (b) (i) or that they had conspired to commit offence punishable under the Act and, therefore, the appeal of the State against their acquittal should be dismissed. According to the learned Counsel for the respondents, as two views are possible, the judgment impugned in the appeal should be confirmed. It was argued that cogent and convincing reasons have been assigned by the learned Judge of the Trial Court for acquitting the respondents and as the learned Additional Public Prosecutor for the State has failed to dislodge those weighty reasons, the appeal, which lacks merits, should be dismissed.

10. This Court has heard Mr. K. T. Dave, learned Additional Public Prosecutor for the State and Mr. M. J. Budhdhbhatti, learned Counsel of the respondents, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case as well as the entire evidence on record with reference to broad and reasonable probabilities of the case.

11. On re-appreciation of the evidence on record, this

Court finds that Mr. Tehlramani was working as PI, CID Crime, Narcotic Cell, Ahmedabad and was a Gazetted Officer. In view of the Notification No. GH-L.14-NDS-1087(i)-M dated June 15, 1987 issued by State of Gujarat under Section 41 (2) of the Act, he is also an Empowered Officer. Therefore, he was obliged to comply with the provisions of Section 41 (2) of the Act and not Section 42 (2) of the Act. The record shows that the information received by PI Mr. Tehlramani was reduced into writing by him. This becomes clear on perusal of his testimony recorded at Exh. 57 as well as from the contents of the document produced at Exh. 18, which is the entry made in the Information Register. In view of the aforementioned facts and circumstances, this Court is of the firm opinion that there was no violation of sub-section (2) of Section 42 of the Act. The finding recorded by the learned Judge is erroneous and, therefore, liable to be set aside. It is accordingly set aside.

It is held by the learned Judge that there was non-compliance of Section 55 of the Act. Section 55 of the Act reads as under:

> "**55. Police to take charge of articles seized and delivered.-** An officer in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the

> Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station."

The abovequoted provision is interpreted by Division Bench of this Court in **R.B. Mishra Vs. State of Gujarat, 2000 (1) GLH 137.** After examining the scheme of the Act, it is held as under:

> "10. Mr.Kapadia then has pressed into service, Section 55 of the NDPS Act by submitting that PSO (Police Station Officer) of Chowk Bazaar police station has not put his separate seal on the muddamal article. Mr.Kapadia's attention was drawn to our aforesaid recent decision in Salimuddin's case (supra),where we had an occasion to deal with the provision of Section 55 of the NDPS Act relying upon a Bench decision of this Court in the case of State of Gujarat Vs.Abdul Rashid Ibrahim Mansuri - 1990 (2) GLH 398. The Bench observed :
>
> > "41.Mr.Malik, learned Advocate for the respondent, contends that the provisions of Sections 52 and 55 are not complied with inasmuch as the Police Station Officer has not put his seal on the muddamal packets and subsequently the muddamal articles were taken to the Dudheshwar Crime Branch Police Chowky, from where P.S.I., Vaghela has taken the same to the Forensic Science Laboratory. Under Section 52, the Officer arresting the person has to inform him of the grounds of arrest and in case warrant is issued by the Magistrate and on the strength of the

warrant, such person is arrested, then such person should be forwarded to the Magistrate. Sub-section (3) of Section 52 provides that every person arrested and articles seized under sub section (2) of Section 41 or Section 42 or Section 43 or Section 44 shall be forwarded without unnecessary delay to the Officer in charge of the nearest Police Station or the Officer empowered under Section 53. Under sub-section (4) of Section 52, the authority or the Officer, to whom any person or article is forwarded under sub-section (2) or sub-section(3) shall, with all convenient despatch, take such measures as may be necessary for the disposal according to law of such person or article. So far as dealing with such person is concerned, the Officer in charge of the Police Station may either secure police custody remand or send such person to judicial custody under the provisions of the Criminal Procedure Code. So far as the articles, which are produced before the Police Station Officer is concerned, they are required to be dealt with as provided in Section 55 of the Act. Section 55 provides that the Officer in charge of the Police Station himself take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under the Act within the local area of that police station and allow any Officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or take samples of and from them and all samples so taken are also required to be sealed with the seal of the Officer in charge of the Police Station. Sections 52 and 55, NDPS Act deal with the situations after the seizure and arrest. The articles are required to be sealed by

> the Police Station Officer with a view that they may be protected properly and may not be tampered with. In case such articles are produced before the Officer in charge of the Police Station, the Officer producing such articles should affix his seal to such articles or take samples of such articles. In case the samples are taken, such samples are also required to be sealed with the seal of the Officer in charge of the Police Station. The seal of the Officer in charge of the Police Station is to be affixed only on the samples which are taken. It is not necessary that in case the articles are brought and delivered to the Officer in charge of the Police Station by the authorised Officer seizing such goods, then again the second seal of the Officer in charge of the Police Station should be affixed on it. Even when the articles are produced, the Police Station Officer has to allow the Officer seizing the articles or the Officer deputed by such Officer to affix his seal."

From the aforesaid observations, it might be noted that the seal of the officer was to be affixed only on the samples which are taken. It is not necessary that in case the articles are brought and delivered to the officer-in-charge of the Police Station by the authorised officer seizing such goods, then again the second seal of the Officer-in-charge of the Police Station should be affixed on it. This is what the Bench has observed, on consideration of provisions of Section 55 of the NDPS Act. In the present case, the box containing the muddamal article duly sealed came to be handed over to the police station officer who had preserved the same in the same condition and the whole of the muddamal duly sealed was sent to the FSL. Thus, the present case would be squarely covered by the decision in *Abdul Rashid*

> *Ibrahim Mansuri's case (supra)*. The Bench has further observed that, *in case the Officer seizing the articles has affixed the seal at the place of seizing the articles or at any other place and after that, the articles are delivered to the officer in charge of the Police Station, it will not be necessary for the Officer in charge of the Police Station to affix his seal. Section 55 does not provide for any such procedure.* We might note that similar is the present case but on a better footing inasmuch as on the same day the muddamal article has been arranged to be sent to the Forensic Science Laboratory and there was no action of separating the samples from the muddamal article and sending the same to the FSL.“

Applying the ratio laid down in abovequoted decision to the facts of the present case, this Court finds that there is no breach of provisions of Section 55 of the Act at all. After *muddamal* was handed-over to PSO for keeping the same in safe custody, the samples were not drawn either by PI Mr. Tehliramani or any person deputed by him. Therefore, the PSO was not required to apply his seal on the seized article at all. Thus, there is no breach of provisions contained in Section 55 of the Act and the finding recorded by the learned Judge is liable to be set aside, which is accordingly set aside.

It is further held by the learned Judge that provisions of Section 57 of the Act have not been complied with. However, on perusal of the record of the

case, more particularly, the document produced at Exh. 17, it is found that search and seizure was reported by PI Mr. Tehlramani to his immediate official superior. This document has been totally ignored by the learned Judge while recording the finding that provisions of Section 57 of the Act are not complied with. Finding recorded in ignorance of evidence on record is liable to be set aside and it is hereby set aside.

So far as breach of Section 52-A of the Act is concerned, this Court finds that Section 52-A of the Act is with regard to disposal of seized narcotic and psychotropic substances. It is not applicable to the facts of the present case at all. This Court fails to understand as to why the learned Judge of the Trial Court has come to the conclusion that there was breach of Section 52-A of the Act. The said finding, having been recorded without any basis, is also hereby set aside.

On further perusal of the overwhelming documentary evidence and the oral deposition, it becomes clear that the learned Judge was not justified in holding that there was breach of Section 102 (3) of the Code. The document at Exh. 30, which is the report made by Mr. M. M. Thakore, Police Sub-Inspector, Sardarnagar Police

Station, to learned Metropolitan Magistrate, shows that the respondents were produced before the learned Magistrate on June 7, 1997 as they were arrested in connection with the commission of offences punishable under the Act. Thus, seizure was reported to the learned Magistrate. Further, the record shows that on that very date, an application seeking police custody of the respondents was submitted *vide* Exh. 31 wherein all particulars necessary, including, seizure was mentioned. Thus, the production report and application for police custody will have to be treated also as report under Section 102 (3) of the Code. The learned Judge, therefore, was not justified in holding that there was breach of Section 102 (3) of the Code. The said finding is, therefore, liable to be set aside. It is accordingly set aside.

The learned Judge has recorded the finding that the respondents were not the owners or in possession of the house where the raid was carried out. However, on perusal of the evidence on record, it becomes clear that ration card was found from the house where the raid was carried out. The ration card indicates that the respondents were named therein. The information received was that the respondents were in possession of contraband

articles. They were found together sitting on a cot outside the house. Therefore, the question of possession and conscious possession will have to be decided in the light of these facts. In **Madan Lal And Another Vs. State of H.P., (2003) 7 SCC 465**, it was argued before the Supreme Court that the statement of one of the accused indicated that he alone was in possession of contraband items but others who were travelling in the car were not in possession of contraband article. While repelling the said contention, the Supreme Court has held in paragraphs 18 to 27 as under:

> "18. The other plea which was emphasized was the alleged statement of accused-Goyal Nath that he alone was in possession of the contraband bags. The plea centers around a statement of search witness PW-1, who stated that Goyal Nath told him that contraband articles belonged to him. The statement was made totally out of context and no credence can at all be attached to the statement. The accused-Goyal Nath in his examination under Section 313 of the Code of Criminal Procedure, 1973 (in short "the Code") did not state that he alone was in possession of the contraband articles. On the contrary, he stated that he did not know anything about the alleged seizure.
>
> 19. Whether there was conscious possession has to be determined with reference to the factual backdrop. The facts which can be culled out from the evidence on record is that all the accused persons were travelling in a vehicle and as noted by the Trial Court they were known to each other and it has not been explained or shown as to how they travelled together from the same destination in a vehicle which was not a public vehicle.

20. Section 20(b) makes possession of contraband articles an offence. Section 20 appears in Chapter IV of the Act which relates to offence for possession of such articles. It is submitted that in order to make the possession illicit, there must be a conscious possession.

21. It is highlighted that unless the possession was coupled with requisite mental element, i.e. conscious possession and not mere custody without awareness of the nature of such possession, Section 20 is not attracted.

22. The expression 'possession' is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in *Superintendent and Remembrancer of Legal Affairs, W.B. v. Anil Kumar Bhunja [(1979) 4 SCC 274 : 1979 SCC (Cri) 1038: AIR 1980 SC 52],* to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the context of all statutes.

23. The word 'conscious' means awareness about a particular fact. It is a state of mind which is deliberate or intended.

24. As noted in *Gunwantlal v. State of M. P. [(1972) 2 SCC 194: 1972 SCC (Cri) 678 : AIR 1972 SC 1756]* possession in a given case need not be physical possession but can be constructive, having power and control over the article in case in question, while the person whom physical possession is given holds it subject to that power or control.

25. The word 'possession' means the legal right to possession (See *Heath v. Drown* (1972) (2) All ER 561 : 1973 AC 498 : (1972) 2 WLR 1306 (HL)). In an interesting case it was observed that where a person keeps his fire-arm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. *(See Sullivan v. Earl of Caithness (1976 (1) All ER 844 : 1976 QB 966 : (1976) 2 WLR 361 (QBD))*.

> 26. Once possession is established the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles.
>
> 27. In the factual scenario of the present case, not only possession but conscious possession has been established. It has not been shown by the accused-appellants that the possession was not conscious in the logical background of Sections 35 and 54 of the Act."

Again in the case of **Megh Singh Vs. State of Punjab, (2003) 8 SCC 666**, the prosecution case was that the police party while on patrol duty on 22-02-1993, saw three persons including the appellant sitting on gunny bags. The appellant was arrested while the other two fled away. Twenty-five bags found at the spot were seized which were containing poppy husk. It was argued before the Supreme Court that the appellant therein was not in conscious possession of poppy husk. Negativing the said contention, the Supreme Court has held in paragraphs 4 to 14 as under:

> "4. Learned counsel appearing for the accused-appellant submitted that the facts of the case have great resemblance with that of *Avtar Singh v. State of Punjab [2002 (7) SCC 419 : 2002 SCC (Cri) 1769].* Since conscious possession has not been proved, the conviction of the accused-appellant cannot stand on a different footing

from those co-accused who have been acquitted. Non-compliance with requirements of Section 50 of the Act vitiates the conviction.

5. In response, learned counsel for the respondent State submitted that conscious possession has been established and by application of logic of Section 54 of the Act when physical possession is established, there is presumption of conscious possession. Merely because co-accused persons have been acquitted that cannot be a factor to hold the accused appellant innocent. It is submitted that since there was no personal search, Section 50 of the Act has no application.

6. Whether there was conscious possession has to be determined with reference to the factual backdrop. The facts which can be culled out from the evidence on record is that the accused was sitting atop gunny bags containing the contraband articles.

7. Section 20(b) makes possession of contraband articles an offence. Section 20 appears in Chapter IV of the Act which relates to offence for possession of such articles. It is submitted that in order to make the possession illicit, there must be a conscious possession.

8. It is highlighted that unless the possession was coupled with requisite mental element, i.e. conscious possession and not mere custody without awareness of the nature of such possession, Section 20 is not attracted.

9. The expression 'possession' is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different backgrounds. It is impossible, as was observed in *Superintendent and Remembrancer of legal Affairs, W.B. v. Anil Kumar Bhunja [(1979) 4 SCC 274 : 1979 SCC (Cri) 1038 : AIR 1980 SC 52]*, to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the context of all statutes.

10. The word 'conscious' means awareness about a particular fact. It is a state of mind which is deliberate or intended.

11. As noted in Gunwantlal v. State of M. P. *[(1972) 2 SCC 194: 1972 SCC (Cri) 678 : AIR 1972 SC 1756]* possession in a given case need not be physical possession but can be constructive, having power and control over the article in case in question, while the person whom physical possession is given holds it subject to that power or control.

12. The word 'possession' means the legal right to possession (See *Heath v. Drown* (1972) (2) All ER 561 : 1973 AC 498 : (1972) 2 WLR 1306 (HL)) In an interesting case it was observed that where a person keeps his fire arm in his mother's flat which is safer than his own home, he must be considered to be in possession of the same. *(See Sullivan v. Earl of Caithness (1976 (1) All ER 844 : 1976 QB 966 : (1976) 2 WLR 361 (QBD))*.

13. Once possession is established the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles. This position was highlighted in *Madan Lal v. State of H.P. [(2003) 7 SCC 465 : 2003 (6) SCALE 483]*.

14. In the factual scenario of the present case not only possession but conscious possession has been established. It has not been shown by the accused-appellant that the possession was not conscious in the logical background of Sections 35 and 54 of the Act.

Applying the ratio laid down in abovequoted decisions to the facts of the case on hand, this Court is

of the opinion that the prosecution has successfully proved that the respondents were in conscious possession of contraband articles and could not have been acquitted by the learned Judge on the ground that they were not found in conscious possession of the same. The said finding, being erroneous, is hereby set aside.

The learned Judge has held that the investigation carried out by PI Mr. Tehlramani was insufficient, inadequate and incomplete. However, this Court finds that the case of the prosecution was that the accused were in conscious possession of contraband article. It was not the case of the prosecution that the accused were either dealing in narcotic drug or importing or exporting the same in inter-state. Therefore, it was not necessary for the prosecution to investigate as to from where the accused had procured *ganja* or who were the persons who had supplied *ganja* to them. One of the grounds assigned by the learned Judge for doubting prosecution case is that services of a decoy were not used to establish that the respondents were found in possession of *ganja*. However, this Court is of the firm opinion that it was not necessary to arrange the raid through a decoy, as it was not the case under Immoral Traffic (Prevention) Act, 1956 or under the provisions of Prevention of Corruption

Act, 1947, where the services of a decoy may be requisitioned. Therefore, the case of the prosecution could not have disbelieved merely because decoy was not sent to purchase contraband article from the respondents. The prosecution case could not have been doubted on the ground that the investigation was incomplete. The whole approach of the learned Judge to the problem is thoroughly erroneous and in contravention of the statutory provisions. Therefore, the findings recorded on this count will have to be set aside and are hereby set aside.

The learned Judge has held that *muddamal* was not kept in safe custody so as to rule out the possibility of tampering with the same. The learned Judge has further held that Arjun Sinh, who had carried the sample to the FSL was not examined by the prosecution and, therefore, it was reasonable to believe that there was possibility of tampering with *muddamal*. However, this Court, on re-evaluation of evidence of witnesses examined in the case, finds that after sealing *muddamal*, it was handed over by PI Mr. Tehlramani to PSO. The PSO has deposed, in his testimony before the Court, that he had kept the same in safe custody. Thereafter, it had reached FSL through Head Constable Arjun Sinh. The report of the analysis

makes it very clear that the seal applied on the same was intact. Further, the record shows that the *panch-witnesses* had signed on three slips. All the three slips were already used and no other slip was available which could have been used on the sample after tampering with the same. Therefore, there was no basis for the learned Judge to come to the conclusion that there was possibility of tampering with the same. The said finding is totally perverse and is hereby set aside.

It is further held by the learned Judge that no independent witnesses were examined by the prosecution and, therefore, the deposition adduced by PI Mr.Tehlramani becomes vulnerable. However, this Court finds that non-examination of the independent witnesses by the prosecution would not make the prosecution case weak in any manner at all. On perusal of the deposition adduced by PI Mr. Tehlramani, it becomes clear that the deposition adduced by him is reliable and dependable and the same is supported by contemporary documents. As explained in **Ramanand Yadav Vs. Prabhu Nath Jha and Others, AIR 2004 SC 1053**, the so-called left out independent witnesses could have been examined by the defence as its witnesses and, therefore, the finding recorded by the learned Judge cannot be sustained and is

liable to be set aside. It is accordingly set aside.

It is held by the learned Judge that the deposition adduced by the *panch-witnesses* do not inspire the confidence and as the *panch-witnesses* could not recount as to what had transpired during the course of the preparation of *panchnama*, they should be disbelieved. However, on overall perusal of the documentary and the oral evidence adduced by the prosecution, this Court is of the firm view that the function of the *panch-witnesses* was to accompany the raiding party when the raid was carried out. They were not supposed to hear the talk between the PI and the respondents. Relevant facts which must be stated have been stated by the *panch-witnesses*. In view of this state of affairs, the finding recorded by the learned Judge, in our view, is liable to be set aside and the same is hereby set aside.

12. The learned Judge has acquitted the respondents for the offences punishable under Sections 20 (b) (i) read with Section 29 of the Act and Section 66 (1) (b) of the Bombay Prohibition Act, 1949. However, taking into consideration the documentary evidence and the oral deposition adduced by the prosecution, this Court is of the firm view that prosecution has failed to establish

abetment and / or the conspiracy within the meaning of Section 29 of the Act and cannot be interfered with. However, the finding that no offence is committed under Section 20 (b) (i) is based on surmises and not on well recognised interpretation of statutory provisions. The net result of the abovementioned discussion is that the uncalled acquittal of the respondents will have to be reversed and the respondents will have to be convicted for the commission of offences punishable under Section 20 (b) (i) of the Act and Section 66 (1) (b) of the Bombay Prohibition Act, 1949. The only view possible in the matter on the evidence on record is that commission of offences by the respondents punishable under the provisions of Section 20 (b) (i) of the Act and Section 66 (1) (b) of the Bombay Prohibition Act, 1949 is firmly established and, therefore, the judgment impugned in the appeal will have to be set aside.

13. For the foregoing reasons, the judgment rendered by the learned Additional City Sessions Judge, Court No. 3, Ahmedabad on July 27, 1998 in Sessions Case No. 174 of 1997 acquitting the respondents of the offences punishable under Section 20 (b) (i) of the Act and Section 66 (1) (b) of the Bombay Prohibition Act, 1949 is hereby set aside. Instead, the respondents are convicted

for the offences punishable under Section 20 (b) (i) and Section 66 (1) (b) of the Bombay Prohibition Act, 1949. This Court has elaborately heard the learned Counsels of the parties with regard to sentence to be imposed for the commission of offences punishable under Section 20 (b) (i) and Section 66 (1) (b) of the Bombay Prohibition Act, 1949. Section 20 (b) (i) of the Act, as was applicable to the facts of the case, was as under:

> **"20. Punishment for contravention in relation to cannabis plant and cannabis.** - Whoever, in contravention of any provisions of this Act or any rule or order made or condition of licence granted thereunder,-
>
> (b) produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses cannabis, shall be punishable,-
>
> (i) where such contravention relates to ganja or the cultivation of cannabis plant, with rigorous imprisonment for a term which may extend to five years and shall also be liable to fine which may extend to fifty thousand rupees;"

A bare reading of abovequoted provisions makes it very clear that sub-clause (i) of Clause (b) of Section 20 of the Act did not prescribe minimum punishment to be imposed at all and wide discretion, which must be judiciously exercised, was available to the Court.

14. The record of the case shows that the respondents

were arrested on June 7, 1997 and were not granted bail during the pendency of trial. They came to be released from jail only when judgment of acquittal was pronounced by the learned Additional City Sessions Judge, Court No. 3, Ahmedabad, on July 27, 1998. It means that as under-trial prisoners, the respondents were in jail for a period of one year and one month. The provisions of Act No. 9 of 2001 would not be applicable to the facts of instant case. However, the Court cannot be oblivious of the fact that graded punishments have been provided by the amending Act and that attempt is to reform those persons who are convicted under the Act. The Court is reversing the acquittal of the respondents roughly after about seven years. On the facts and in the circumstances of the case, this Court is of the opinion that interest of justice would be served if each of the respondents is sentenced to RI for one year and one month and fine of Rs. 5,000/- (Rupees Five Thousand Only), in default SI for six months. Accordingly, for the commission of offence punishable under Section 20 (b) (i) of the Act, each of the respondents is sentenced to RI for one year and one month as well as fine of Rs. 5,000/- (Rupees Five Thousand Only), in default SI for six months. No separate sentence is imposed on any of the respondents for commission of offence punishable under Section 66 (1) (b)

of the Bombay Prohibition Act, 1949. It is made clear that the respondents have already undergone substantive sentence imposed on them by this Court as under-trial prisoners and, therefore, it is not necessary for any of them to surrender to jail authorities to undergo the sentence imposed on them by this Court. As far as payment of Rs. 5,000/- (Rupees Five Thousand Only) is concerned, each of the respondents is given time of two months to pay the same from the date of receipt of writ, failing which they shall have to undergo SI for six months, as directed by the Court. The appeal, accordingly, stands allowed to the extent mentioned hereinabove. *Muddamal* be disposed of in terms of the provisions of the Act.

[J. M. PANCHAL, J.]

[H. B. ANTANI, J.]

/shamnath